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In The

Supreme Court of the United States

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United States of America

In re Leon Braun

Petitioner

v.

Seminole Tribe of Florida Inc.,
and Seminole Tribe of Florida

Respondent

------*------

PETITION FOR A WRIT OF MANDAMUS ON THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

------*------

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Counsel of Record
Counsel for Petitioner

Dated: January 8, 2001

54 pp

QUESTIONS PRESENTED

1. Whether mandamus should issue to the United States Court of Appeals for the Eleventh Circuit compelling that court to reverse themselves on their decision barring the U.S. Government with Relator, Leon Braun , from bringing a qui tam action, under The False Claims Act, ("FCA"), 31 U.S.C. §§ 3729-30 et-seq, against the Defendants, Seminole Tribe of Florida and Seminole Tribe of Florida, Inc. as a result of the Indians asserting that the Federal Court lacks jurisdiction because of the Doctrine of Indian Sovereign immunity?

2. Does the U.S. Government abrogate the rights of the Seminole Tribe of Florida to invoke the purported doctrine of Sovereign Immunity when relating to violation of Federal Law pursuant to 25 CFR, Indians, Chapter 3, Subchapter II- § 81. Contracts and agreements with Indian tribes, which provides an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in a federal action brought against the Indian tribe?

3. Does the Seminole Tribe of Florida specifically abrogate its purported claim of Sovereign Immunity as related to violations of Federal law pursuant to its own Constitution of the Seminole Tribe of Florida, Ratified August 21, 1957 ----Article V, wherein The Seminoles Tribe agrees to abide by the United States Constitution and its Laws?

4. Can an Indian Tribe, (Seminole Tribe of Florida)

defraud the U.S. Government by taking money contrary to the provisions of the False Claims Act, 31 U.S.C. §§ 3729-30 et-seq, then assert absolute immunity from suit by invoking the purported doctrine of Tribal Immunity contrary to the provision of the U.S. Constitution. (Article 3 Clause 2) which states:

> *"the judicial Power shall extend to all Cases, in Law and Equity...-to Controversies to which the United States shall be a Party..."*?

5. Was the lower courts' summary dismissal of the U.S. Government's complaint against the Seminole Tribe of Florida alleging violations of the False Claims Act, 31 U.S.C. §§ 3729-30 et seq, by invoking the Doctrine of Sovereign Immunity contrary to the provisions of the U.S. Constitution, Article 9 which states:

> *"No money . shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time."*?

6.Did the Eleventh District Court commit "Plain Error" when stating (see Page 3 of Appendix, under Analysis)

> *"While the various circuits of the United States Court of Appeals have not yet reached the issue of tribal sovereign immunity when a private citizen has brought a qui tam action against an American Indian tribe under the False Claims Act ..."*

not withstanding the qui tam decision (United States of America, ex rel. Glenn A. Hall, v. Tribal Development Corporation, No. 93-3519. Decided on Rehearing March 9, 1995.) which have held that the Doctrine of Tribal

immunity does not bar such action?

7..Did the Eleventh District Court and the Appellate Court commit Plain Error when not recognizing that the U.S. Government was the Plaintiff in this action and therefore, improperly by the Doctrine of Tribal Immunity, summarily dismiss this action; thereby substantially and severely impairing the right of the U.S. Government to collect damages as a result of the improper and unlawful conduct of the Seminole Tribe of Florida in violation of the False Claims Act ,31 U.S.C. §§ 3729-30 et-seq?

8. Whether the Court's decision to grant immunity related to unaccounted fund, contrary to reporting required by 25 CFR 450c et-seq, is in the Indian population's best interest as that decision allows needed funds to be dissipated without accountability?

PARTIES TO THE PROCEEDINGS

The United States Government with Leon Braun acting as counsel/relator was also the petitioner in the U.S. District Court and the U.S. Court of Appeals, and the Seminole Tribe of Florida, Inc., and the Seminole Tribe of Florida were the respondents.

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to Fed. R. App. P. 36.1 and Eleventh Circuit Rule 26.1-1 the writer hereby certifies that the following persons and corporations have an interest in the outcome of this case.

Billie, James -- Chairman Seminole Tribe of Florida
Braun, Leon-- Relator/counsel for Government.
Clerks Office--U.S. District Court. Miami Fl.
Cypress, Mitchell Pres.--Seminole Tribe of Florida Inc.
Donlan, Maureen---Assistant U. S. Attorney, Miami, Fl.
Jones, Gordon A.--Civil Division -U.S. Dep. of Justice
Kamen & Orlovsky, --Attorneys for Seminole Tribe
Lenard, Joan A. --United States District Judge
Lerner & Pearce, P.A.--Council to Sem. Tribe of Fl. Inc.,
Schultz, Anne, R.--Chief, Appellate Division, U.S. Department of Justice
Seminole Tribe of Florida Hollywood, Fl.
Seminole Tribe of Florida Inc., Hollywood, Fl.
Turnoff, William C. --Magistrate
J. L. Edmondson- Eleventh Circuit Appellate Judge
R. L. Anderson- Eleventh Circuit Appellate Judge
J. F. Dubina- Eleventh Circuit Appellate Judge

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PETITION FOR A WRIT OF MANDAMUS

United States of America, through its undersigned counsel/relator, Leon Braun, respectfully petitions for a Writ of Mandamus to reverse the decision of the Eleventh Circuit District Court dismissing a False Claims Act case against the Seminole Tribe of Florida and the Seminole Tribe of Florida for "Lack of Subject Matter Jurisdiction. The U.S. Board of Appeals for the Eleventh Circuit approved that decision by denying our appeal.

In making this request we will show:

(1) the District Court's action, granting immunity to the Seminole Tribe of Florida when they have allegedly committed Fraud against the Government , is clearly contrary to written law and case histories when related to the False Claims Act and Tribal Immunity;

(2) there has been a fraud perpetuated against the U.S. Government and the petitioner has no other adequate means, such as direct appeal, to obtain relief;

(3) The district court's order raises issues of law of first impression which are in error. and

(4) those actions by Appellate Court reflect oft-repeated errors and manifest persistent disregard of federal rules of sovereign immunity and government rights; and

(5) it is required that this case proceed in order to protect the Constitution and the best interest of all parties, which includes the U.S. Government and the general population of the Seminole Tribe of Florida.

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OPINIONS BELOW

The Eleventh Circuit Federal Court dismissed this case , 98-6580-CIV-LENARD, on Aug. 31, 1999 for Lack of Subject Matter Jurisdiction. (Appendix 1 *infra*)

The opinions stated in that decision were appealed to the United States Court of Appeals for the Eleventh Circuit. Case #99-13678-BB. The "PER CURIAM" decision of the Appellate Court affirmed the lower court's decision with no detailed explanation. (App. 10. *infra*). It is unpublished.

The Petition for Rehearing was also denied "PER CURIAM" and unpublished. (App . 12 *infra*).

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JURISDICTION

The Eleventh District Court of Appeals filed their first decision denying the Governments Appeal on Oct 27, 2000. (App. 10, *infra*). A petition for rehearing was denied Oct. 27, 2000.(App. 12. *Infra).*

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1651(a) and United States Supreme Court Rule 20.3(a), to compel the United States Court of Appeals for the Eleventh Circuit, the Honorable J. L. Edmondson, R. L. Anderson and J. F. Dubina Circuit Judges to reverse their decision and order the District Court to accept "subject matter jurisdiction".

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CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED

The Constitution of The United States, Article III-Section 2, Clause 1, states:

> *the judicial Power shall extend to all Cases, in Law and Equity...-to Controversies to which the United States shall be a Party.* (App. 8, *infra.*)

The United States Constitution , Section 9. States ..

> *No money shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time.*

The False Claims Act, *(31 U.S.C. 3729 - 3733)*, states:

> *any person who knowingly presents, or causes to be presented, to the United States Government a false or fraudulent claim for payment or approval has a liability for that action*

.

Plain error under *(Rule 52(b))* means error both obvious and substantial; the rule should be invoked only where exceptional circumstances make it necessary to avoid a clear miscarriage of justice.

Title 25, 1772a -q defines the Seminole Tribe of Florida as a Tribe organized under section 476 of Title 256 et-seq.

Title 25, Chapter 3, Subchapter II, &81 abrogates sovereign immunity as a defense in an action brought against the Indian Tribe when Federal Law is involved..

BACKGROUND

On June 5,1998, Leon Braun, as the Relator, filed a False Claims Act Suit against the Seminole Tribe of Florida and the Seminole Tribe of Florida, Inc., for the United States Government *(Case 95-6580-CIV LENARD)*. The case was dismissed for "lack of subject matter Jurisdiction." (App. 1 *intra)*

Appeal was made to the Eleventh Circuit Court of Appeals, *(RE 99-13678)* and denied. (App. 10, *intra)*. A second appeal was made and denied. *(*App. 12, *intra)*.

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DISCUSSION OF THE QUESTIONS

1. The District Court erred in assuming this was the first "qui tam" action against Indian Tribes and that issue had never been decided. (App. 3, Analysis, *intra*)

In a Qui tam action brought on behalf of United States, *(U.S.A. ex rel. Glenn A. Hall v. Tribal Development Corporation, Corp.*, No. 93-3519, (1994), the Court held that:

> *(1) United States, rather than parties that brought action on its behalf, was plaintiff for standing purposes, and*
>
> *(2) United States suffered sufficient injury-in-fact for purposes of Article III standing.*
>
> *When the legislative body enacts provisions enabling qui tam actions, that act carries with it understanding that in such suits it is government, and not individual relator, who has suffered injury resulting from violation of underlying law and is therefore real plaintiff in the action.*

It has been established, **The United States of America is the plaintiff, not Leon Braun the Relator.** There is no

immunity when the United States is the Plaintiff. **The Court erred. Case history shows the Federal Courts have jurisdiction in a False Claims Act case.**

2. Whether the Seminole Tribe of Florida can interpose its sovereign immunity over the Supremacy of the United State?
In other words, can the Seminole Tribe of Florida defraud the U.S. Government then claim sovereign immunity?

Constitution of The United States, Article III--The Judiciart.

> *Section 2, Clause 1. Jurisdiction of Courts,:*
> *The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;-;--to Controversies to which the United States shall be a Party;--*

This False Claims Act case is an action by the United States against the Seminole Tribe of Florida and the Seminole Tribe of Florida, Inc. for Fraud. Therefore the United States is a Party (Plaintiff), the Federal Court has jurisdiction. This was established in court.(see *U.S. ex rel. McCarty v. Hollis, C.C.A.10 (Okla.) 1941*, 120 F.2d 540).

> *The jurisdiction of a United States court to entertain a suit by the United States for enforcement... is based on the provision that judicial power of United States shall extend to all controversies to which the United States is a party.*

This False Claims Act case, as all qui-tam actions, is the United States as the plaintiff and therefore judicial power of United States prevails.

Oliphant v. Saquamish Indian Tribe, 35 U.S. 191 (1978) stated that tribal sovereignty is limited in three ways: --- Justice Rehnquist -

> *Tribes are not permitted to exercise powers that are surrendered by treaty; and*
> *Tribes are not permitted to exercise powers that are prohibited by federal statute; and*
> *Tribes are not permitted to exercise powers that are inconsistent with their status of a domestic dependant nation.*

The Seminole Tribe of Florida is a domestic dependant nation defined by 25 CFR 1772a, 476, Chapter 3, Subchapter II, §81.,(page 8,*infra*)wherein they are prohibited by federal statute to claim immunity to Federal violations.

In *Reich v. Mashantucket* the Court of Appeals, McLaughlin, Circuit Judge, held that:

> *(1) inherent tribal sovereign power did not preempt application of federal regulatory scheme that was silent on its application to Indians;*

Other cases, *(U.S. ex rel. Hall v. Tribal Development Corp., C.A.7 (Wis.) 1995,* 49 F.3d 1208, on remand 165 F.R.D. 83), *United States v. Red Lake Band of Chippewa Indians,* 827 F.2d 380, 382 (8th Cir.1987) in essence agreed:

> *It is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States.*

.

The Seminole Tribe of Florida, when being chartered, agreed to abide by the Constitution and Statutes of the United States.

> *"Constitution of the Sem. Tribe of Florida. Ratified August 21, 1957, Article V. Powers of tribal council--the Tribal Council of the Seminole Tribe of Florida shall exercise the following powers, subject to any limitation imposed by the Constitution or the Statutes of the United States."*

The False Claims Act was in existence when Seminole Tribe of Florida agreed to abide by the statutes of the United States.

There is no Sovereign immunity in this case and the United States may not be refused its right in court to protect its interest..

3. The District Court also stated : *"ambiguities in federal laws must be resolved to the Indians advantage"*.(App. 8, *infra*)

Other parts of this paper shows there are no ambiguities. However, this Court's decision is not to the advantage of the Seminole Tribe of Florida's general population. It is evident that if the money in question was reported properly and shown to be used properly, *(* 25 CFR&450c, App. 15, *infra)* this case would not be in court. If the Seminole Tribe of Florida does not report as required, there is nothing to stop unscrupulous individuals from diverting money required to help those in need.

The financial damage to our country and the injury to the Indians in need will continue endlessly unless there is proper enforcement of the desires of Congress. It is in the Indians best interest that discovery be made, funds recovered and then the funds redistributed properly.

The Court erred in not realizing there was past history showing the Federal Courts have jurisdiction and the Court erred because it is in the Indian general population's best interest to proceed with this case.

4. The Seminole Tribe of Florida's immunity.

The Seminole Tribe of Florida, and The Seminole Tribe of Florida, Inc., are products of Title 25, 1772a-q et-seq.

> *(1) The term "tribe" means the Seminole Tribe of Indians of Florida or Seminole Tribe of Florida, a tribe of American Indians recognized by the United States and organized under section 476 of this title and recognized by the State of Florida pursuant to chapter 285, Florida Statutes, and its successors.*

In 25 U.S.C., Chapter 3, Subchapter II, § 81. Contracts and agreements with Indian tribes

> *(d) The Secretary (or a designee of the Secretary) **shall refuse** to approve an agreement or contract that is covered under subsection (b) if the Secretary (or a designee of the Secretary) determines that the agreement or contract--*
>
> *(1) violates Federal law; or*
>
> *(2) does not include a provision that----*
>
> *(C) includes an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in an action brought against the Indian tribe (including a waiver that limits the nature of relief that may be provided or the jurisdiction of a court with respect to such an action)....*

From the above (25 U.S.C., Chapter 3, Subchapter II, § 81) Congress has clearly stated the Indians had waived their rights of sovereign immunity as a defense in an action brought against the Indian tribe when they are accused of violating a Federal law. The Seminole Tribe of Florida agreed to that. (Constitution of the Seminole Tribe of Florida, Article 5, page 7, *supra)*

And in accordance with 18 U.S.C. Sec. 3231-

> *" The district courts of the United States shall have original jurisdiction of all offenses against the laws of the United States..."*

Congress did not, and legally could not intend to write Indian Acts allowing them to violate the Constitution, nor give them immunity when they did.
It follows, **the Seminole Tribe has no sovereign immunity in this case and by Federal law, the United States District Court has jurisdiction .**

5. Whether the "Plain Error Doctrine' should be invoked.
Plain Error.

> *"Plain error under Rule 52(b) means error both obvious and substantial; the rule should be invoked only where exceptional circumstances make it necessary to avoid a clear miscarriage of justice. U.S. v. Cormier, C.A.5th, 1981,* 639 F.2d 1177, 1182-1183 *(applying rule to evidentiary error;).*
>
> *To constitute plain error, error must have been so fundamental as to have resulted in a miscarriage of justice;. U.S. v. Lechuga, C.A.5th, 1989,* 888 F.2d 1472, 1480."

Although this case, The U.S. v Seminole Tribe of Florida, was dismissed with no trial, it is suggested that plain error exists because

(1) the record is clear as to the error,
(2) clear and unequivocal rules were violated, and
(3) a substantial right have been denied with material prejudice.

The Eleventh Circuit Court of Appeals was made aware of:(see **PETITION FOR REHEARING,** Appendix 18,

infra)

(A) The Plaintiff was the United States of America.

(1) United States, rather than parties that brought action on its behalf, was plaintiff for standing purposes, and

(2) United States suffered injury-in-fact for purposes of Article III standing.

(B) The Case histories cited were not relevant and the resulting decision violated written law.

(1)The Eleventh Circuit District Court and the Appellate Court knowingly cited cases (Florida Paraplegic. Assoc. v. Miccosukee Tribe of Indians of Fl., 166 F.3d 1126,1131(11th Cir. 1999) & nn.11-12, Florida v. Seminole Tribe, 181 F.3d 1237 (11th Cir. 1999), Kiowa Tribe of Okla. v. Manufacturing Tech.. Inc., 523 U.S. 751, 118 S. Ct. 1700, 1703 (1998), (citations omitted) etc.. that were not relevant because none were a case of the U.S. Government, as a Plaintiff (party), suing the Indians;

(2) Both courts ignored , written law (*supra*), and case history(supra) resulting in both courts violating the sovereign power of the United States. (Supra)

(C)The Seminole Tribe of Florida was bound by 25 CFR 1722, 450c,§ 81. et-seq ., which defined the Seminole Tribe of Florida, set up the rules that the Seminole Tribe of Florida must abide by , and abrogated sovereign immunity when the U.S. Government was a party. The Seminole Tribe of Florida agreed to abide by those rules, and the Seminole Tribe of Florida had agreed to abrogate all immunity in court when violating a Federal law.

(D)The False Claims Act (31 U.S.C. 3729, et-seq)and its

relation to Indians had been tested in the higher Courts (United States of America, ex rel. Glenn A. Hall, v. Tribal Development Corporation, No. 93-3519). This higher Court had ruled the Indians had no immunity in qui-tam (False Claims Act) actions.

It is clear, both the Eleventh Circuit District Court and the Eleventh Circuit Court of Appeals violated the Constitution and Federal laws and in doing so the rights of the United States of America are being violated while the United States has been and will continue to be damaged.

The Plain Error Doctrine appears to be in order.

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7. Conclusion:

A. Because the Decision by the Eleventh Circuit District Court results in a violation of The Constitution, Article II, Section 2 which states the Federal Courts will have jurisdiction to controversies to which the United States shall be a party; and/or

C. Because the decision is in opposition to Article 1 section 9, which states all money drawn from the treasury must be accounted for; and/or

D. Because the decision is contrary to the The False Claims Act (31 U.S.C. 3729, et-seq)which is intended to protect the Government from fraud; and/ or

E. Because the court's decisions is shown to be arbitrary, capricious, an abuse of discretion, contrary to constitutional right and power, and disregard of required statutory jurisdiction, The Plain Error Doctrine should be invoked

For the reasons stated above, The Supreme Court is requested to grant this Petition for Writ of Mandamus to compel the lower courts to reverse their rulings and accept subject matter jurisdiction so this case may proceed.

Submitted this day of January 8, 2001

Leon Braun relator for
The United States of America
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 98-6580-CIV-LENARD

UNITED STATES OF AMERICA,
ex rel LEON BRAUN,

Plaintiff,
vs.

SEMINOLE TRIBE OF FLORIDA, INC.
and SEMINOLE TRIBE OF FLORIDA,
Defendants.

ORDER OF DISMISSAL
FOR LACK OF SUBJECT MATTER JURISDICTION

THIS CAUSE is before the Court upon review of Defendants' motion to dismiss for lack of subject matter jurisdiction, filed March 3, 1999. Having reviewed Defendants' motion and the record, the Court finds as follows.

I. Procedural History

On June 5, 1998, Relator, Leon Braun, brought a qui tam action, under the False Claims Act of 1986 ("FCA"), 31 U.S.C. 3729-30 et seq., against Defendants, Seminole Tribe of Florida, Inc. ("Tribe, Inc.") and Seminole Tribe of Florida ("Seminole Tribe").

Relator claims that Defendant is responsible for the following unlawful actions, which Relator alleges "include but are not limited to":

1. Causing to be presented to an officer or employee of the United States Government a false or fraudulent claim for

payment or approval;
2.Knowingly making or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
3.Having possession, custody, or control of public property or money used, or to be used, by the government and, intending to defraud the Government or wilfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; and
4.Making, using or causing to be made or used, a false record ro statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government.

(Compl. at ¶ 16.) Relator contends that 31 U.S.C. 3732 establishes this Court's jurisdiction to review his qui tam action against Defendants. (Compl. at¶ 4.) Having reviewed Relator's once sealed complaint, the Government elected not to intervene on December 3, 1998.

Defendants then filed a motion to dismiss for lack of subject matter jurisdiction on March 3, 1999. Defendants move the Court to dismiss Relator's action against them because
tribal sovereign immunity precludes this Court's jurisdiction. Defendants maintain that they cannot be sued, unless (I) Congress has specifically abrogated tribal sovereign immunity within the FCA, or (2) the Tribal Council has waived Defendants' immunity from suit. In that vein, Defendants argue that Congress has not expressly abrogated tribal sovereign immunity from the ambit of the FCA. Defendants also points to a Seminole Tribe ordinance
stating that tribal sovereign immunity from third-party suits in

state or federal court extends to the tribe, "its subordinate governmental and economic units as well as its tribal officials, employees and authorized agents. . . absent the clear, express and unequivocal consent of the Seminole Tribe of Florida or the clear, express and unequivocal consent of the United States Congress." (Willie Aff. Ex. B. at 4 (Ordinance No. C-01-95 (1995)).) Defendants proffer this ordinance to show that they have not waived tribal sovereign immunity.

On March 17,1999, Relator filed his response to Defendants' motion. Relator states that the FCA does not explicitly immunize tribal groups from being sued under it. Relator adds that the Major Crimes Act expressly states, "the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except of the District of Columbia, shall extend to the Indian country."

Major Crimes Act, 18 U.S.C. 1152 (emphasis added). Relator deduces from this congressional mandate that he can sue Defendants in federal court under the FCA because they violated the Major Crimes Act. Relator maintains that the issue of a tribal waiver of sovereign immunity is irrelevant because Defendants are not immune under the Major Crimes Act.

On March 24, 1999, Defendants filed their reply in support of their Motion to Dismiss.

II. Analysis

While the various circuits of the United States Court of Appeals have not yet reached the issue of tribal sovereign immunity when a private citizen has brought a qui tam action

against an American Indian tribe under the False Claims Act ("FCA"), 31 U.S.C. 3729 et seq. (1986), they have recently reviewed the issue of whether states are immune from qui tam

actions. The circuits are split on this issue. Compare United States ex rel. Zissler v. Regents of the Univ. of Minn., 1 54 F.3d 870 (8th Cir. 1998) (holding that states are "persons" subject to liability under False Claims Act); and United States ex rel. Stevens V. Vt. Agency of Natural Resources, 162 F.3d 195 (2d Cir. 1998); with United States ex rel. Long v. SCS Business & Tech. Inst. Inc., 1999 WL 178713 (D.C.Cir. 1999) (holding that "person" who may be liable under FCA does not include states); and United States v. Texas Tech Univ., 171 F.3d 279 (5th Cir. 1999) (ruling that states are not liable under FCA, where United States
government does not intervene). But, the Supreme Court barred the courts from drawing binding parallels between state sovereign immunity and tribal sovereign immunity. See Kiowa Tribe of Okla. v. Manufacturing Tech.. Inc., 523 U.S. 751, 118 S. Ct. 1700, 1703 (1998) [hereinafter Kiowa Tribe] (citation omitted) ("the immunity possessed by Indian tribes is not coextensive with that of the States"). In Blatchford v. Native Village of Noatak, 501 U.S. 775(1991), the Supreme Court "distinguished state sovereign immunity from tribal
sovereign immunity, as tribes were not at the Constitutional Convention. They were thus not parties to the 'mutuality of... concession' that 'makes the States' surrender of immunity from suit by sister States plausible."Kiowa Tribe, 118 5. Ct. at 1703, quoting Blatchford, 501 U.S. at 782; but see Florida Paraplegic. Assoc. v. Miccosukee Tribe of Indians of Fl., 166
F.3d 1126,1131(11th Cir. 1999) & nn.11-I2(citations omitted) (extending principles of state sovereign immunity doctrine to determination of tribal sovereign immunity). Therefore, the Court need not resolve the foregoing disagreement among the federal circuits regarding state sovereign immunity under the FCA and its application to the instant matter. The Supreme Court has ruled that tribal sovereign immunity is not absolute. However, Congress is in the best position to limit this doctrine. See Kiowa Tribe, 118 5. Ct. at 1705 (declining to confine tribal

sovereign immunity "to reservations or to noncommercial activities"). In Kiowa Tribe, a payee brought a commercial suit against an American Indian tribe, in Oklahoma state court. See id. at 1703. The payee argued that tribes are not immune from commercial suits arising out of commercial conduct that occurred off the tribe's reservation. See id. However, the Kiowa Tribe Court disagreed. It ruled that the Court could not abrogate tribal sovereign immunity, where Congress had not already done so. See id. at 1705. Since Congress had not eliminated American Indian tribes immunity from commercial suits in state court, the Kiowa Tribe Court found that the tribe was immune from the payee's suit in state court. See id.

Congress has abrogated tribal sovereign immunity in the past. See id., citing 25 U.S.C. 450f(c)(3) (mandatory liability insurance) & 271 0(d)(7)(A)(ii) (gaming activities). Yet, "in other statutes, [Congress] has declared an intention not to alter [tribal sovereign immunity]." See Kiowa Tribe, 118 5. Ct. at 1705, citing 25 U.S.C. 450n (stating that nothing in financial-assistance program is to be construed as "affecting, modifying, diminishing, or otherwise impairing the sovereign immunity from suit enjoyed by an Indian tribe"); Oklahoma Tax Comm'n v. Citizen Band Potawatomi Indian Tribe of Okla., 498 U.S. 505,510 (1991) [hereinafter Potawatomi Tribe] (discussing Indian Financing Act of 1974, 25 U.S.C. 1451 et seq. (1974)).

In order for tribal sovereign immunity to be abrogated, Congress must "unequivocally express" its intent to abrogate. Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978); see Kiowa Tribe, 118 5. Ct. at 1702. Congressional elimination of tribal sovereign immunity from a piece of legislation "cannot be implied but must be unequivocally expressed." Martinez, 436 U.S. at 58-59; accord Florida Paraplegic Assoc. v. Miccosukee Tribe of Indians of Fl., 166 F.3d 1126, 1131(11th Cir. 1999).

In holding that tribes were immune from private suit under the Americans with Disabilities Act ("ADA"), 42 U.S.C. 12181 et seq., the Eleventh Circuit found:

In this broader context of sovereign immunity, the Court has held that Congress may abrogate a sovereign's immunity. "only by making its intention unmistakably clear in the language of the statute"; legislative history and "inferences from general statutory language" are insufficient [citation omitted]. We see no reason to adopt a different standard for evaluating Congressional intent with respect to the waiver of tribal sovereign immunity.

Florida Paraplegic. 166 F.3d at 1131(11th cir. 1999) (quoting Atascadero St. Hosp. v. Scanlon, 473 U.S. 234, 242 (1985)).

The Eleventh Circuit continued:

Although the Supreme Court has continued to emphasize, in cases such as Potawatomi Tribe and Kiowa Tribe, the rule that Congress must unequivocally express its intent to abrogate tribal sovereign immunity, the Court decided the landmark cases setting down this standard--USF&G and Martinez--in 1940 and 1978, respectively. Congress therefore had notice of the need to express its intent clearly when it enacted the ADA in 1990.

Florida Paraplegic,166 F.3d at 1131 n 12. By extension, Congress had notice of the need to express its intent to abrogate tribal sovereign immunity clearly, when it enacted the FCA. Nevertheless, nowhere in the FCA or in its legislative history does Congress declare an intention to abrogate tribal sovereign immunity, so that private citizens may bring qui tam actions against American Indian tribes, under the FCA. In fact, American Indian tribes and their members are mentioned nowhere within the FCA and its legislative history.

Though courts have employed rules of statutory construction to find states liable under the FCA, the same rules reveal no unequivocally expressed intent on the part of Congress to abrogate tribal sovereign immunity in FCA qui tam actions. Using the rule of statutory construction that identical words

used in different parts of the same act are intended to have the same meaning," the Zissler court found that "states" are "persons" subject to liability under the FCA. Zissler, 154 F.3 d at 875 (quoting Comm'r of Internal Revenue v. Lundy, 516 U.S. 235, 250 (1996) (citations omitted)). The Zissler court deduced that states can be sued as persons, under the FCA, from 31 U.S.C. 3733(l)(4)'s inclusion of states in its definition of persons who can enforce the FCA. However, 31 U.S.C. 3733(l)(4) does not include American Indian tribes in its definition of persons who can enforce the FCA.

Further, that tribes have successfully brought qui tam actions against other parties does not mean that tribes are liable as "persons" under the FCA. Courts have been hesitant to allow Indians to initiate qui tam actions, but have ultimately permitted such actions not because tribes are "persons," but rather on the theory that the FCA has "assigned" the government's injury to the Indian relator. See United States ex rel. Mosav v. Buffalo Bros. Management. Inc., 20 F.3d 739, 742 (7th Cir. 1994); United States ex rel. Stiliwell v. Hughes Helicopter. Inc.<-#>, 714 F.Supp. 1084, 1098 (C.D.Cal. 1989); Thomas R. Lee, Comment, The Standing of Qui Tam Relators under the False Claims Act, 57 U. Chi. L. Rev. 543,562 (1990). Finally, courts have long interpreted ambiguities within a statute to protect American Indian rights. See United States V. Nice , 241 U.S. 591,599 (1916) ("According to a familiar rule, legislation affecting the Indians is to be construed in their interest, and a purpose to make a radical departure is not lightly to be inferred."); Worcester v. Georgia, 31 U.S. 515, 6 Pet. 515, 582 (1832) (McLean, J., concurring) ("The language used in treaties with the Indians should never be construed to their prejudice "), White Mountain ApacheTribe v. Bracker, 448 U.S. 136, 143-44 (1980) ("Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of

sovereignty and with the federal policy of encouraging tribal independence."). Today, the Eleventh Circuit continues upon this deferential path. See Florida Paraplegic, 166 F.3d at 1131 (citations omitted) (stating that "because of the 'unique trust relationship between the United States and the Indians,' where Indian rights are at issue, **ambiguities in federal laws must be resolved to the Indians' advantage**"). The Court therefore finds that Congress did not expressly abrogate tribal sovereign immunity within the FCA.[1]

III. Conclusion

Without a clear intent to waive tribal sovereign immunity either by Congress in the FCA or by Defendants themselves, the Court lacks subject matter jurisdiction to hear this matter.

It is therefore **ORDERED AND ADJUDGED** that:

1. Defendant's motion to dismiss for lack of subject matter jurisdiction, filed March 3, 1999, is GRANTED.

2. This case is DISMISSED for lack of subject matter jurisdiction.

3. This case is CLOSED. All pending motions not otherwise ruled upon by separate order are DENIED as moot.

DONE AND ORDERED in Chambers at Miami, Florida, this 31 day of August, 1999.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE

CC: Allan M Lerner Esq Donald A Orlovsky,. Esq

Lerner & Pierce, P.A.
2888 East Oakland Park Boulevard
Fort Lauderdale, Florida 33306

Kamen & Orluvaky, PA
Service Centre South, Suite 402
1601 Belvedere Road
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[1] Though the Major Crimes Act does extend to American Indians, the act creates no private right of action. Private citizens may prosecute violations of the act only through the legal vehicle of the FCA. Without the FCA, the Major Crimes Act is a purely criminal statute. For purposes of tribal sovereign immunity in civil actions, therefore, only a discussion of the FCA is relevant.

[DO NOT PUBLISH]
IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 99 -13678
Non-Argument Calendar

LEON BRAUN, ex rel., United States of America,

Plaintiff-Appellant,

versus

SEMINOLE TRIBE OF FLORIDA, INC., SEMINOLE TRIBE OF FLORIDA,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(August 21, 2000)

Before ANDERSON, Chief Judge, EDMONDSON and DUBINA, Circuit Judges

PER CURIAM:

Leon Braun appeals pro se the district court's dismissal of his claim against the Seminole Tribe of Florida, Inc., chartered in 1957, and the Seminole Tribe of Florida, under the False Claims Act, 31 U.S.C. && 3729-33. Given the lack of a pertinent, unequivocal, and expressed waiver of tribal immunity, the district court did not err in dismissing Braun' s complaint for want of subject matter jurisdiction, based upon the doctrine of tribal sovereign immunity. generally, Florida v. Seminole Tribe, 181 F.3d 1237 (11th Cir. 1999),Florida Paraplegic Ass'n v, Miccosukee Tribe of Indians, 166 F.3d 1126 (11th Cir. 1999), and Maryland Casualty Co. v. Citizens Natal Bank, 361 F.2d 517, 520-21 (Th Cir. 1966).

AFFIRMED.

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 99-13678-BB

LEON BRAUN, ex rel., United States of America,

Plaintiff-Appellant

versus

SEMINOLE TRIBE OF FLORIDA, INC., SEMINOLE TRIBE OF FLORIDA,

Defendants-Appellees.

On Appeal from the United States District Court for the Southern District of Florida

---

BEFORE: ANDERSON, Chief Judge, EDMONDSON and DUBINA, Circuit Judges:

PER CURIAM:

The petition(s) for rehearing filed by the Appellant, Leon Braun, is DENIED.

ENTERED FOR THE COURT:
(Signed J.L Edmondson)
UNITED STATES CIRCUIT JUDGE

False Claims Act, 31 U.S.C. 3729 - 3733

Sec. 3729. False claims

(a) Liability for Certain Acts. - Any person who -

(1) knowingly presents, or causes to be presented, to an officer or employee of the United States Government or a member of the Armed Forces of the United States a false or fraudulent claim for payment or approval;

(2) knowingly makes, uses, or causes to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;

(3) conspires to defraud the Government by getting a false or fraudulent claim allowed or paid;

(4) has possession, custody, or control of property or money used, or to be used, by the Government and, intending to defraud the Government or willfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt;

(5) authorized to make or deliver a document certifying receipt of property used, or to be used, by the Government and, intending to defraud the Government, makes or delivers the receipt without completely knowing that the information on the receipt is true;

(6) knowingly buys, or receives as a pledge of an obligation or debt, public property from an officer or employee of the Government, or a member of the Armed Forces, who lawfully may not sell or pledge the property; or

(7) knowingly makes, uses, or causes to be

made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government, is liable to the United States Government for a civil penalty of not less than $5,000 and not more than $10,000, plus 3 times the amount of damages which the Government sustains because of the act of that person, ...

Title 25 & 450c. Reporting and audit requirements for recipients of Federal financial assistance.

* (a) Maintenance of records

o (1) Each recipient of Federal financial assistance under this Act shall keep such records as the appropriate Secretary shall prescribe by regulation promulgated under sections 552 and 553 of title 5, including records which fully disclose -

+ (A) the amount and disposition by such recipient of the proceeds of such assistance,

+ (B) the cost of the project or undertaking in connection with which such assistance is given or used,

+ (C) the amount of that portion of the cost of the project or undertaking supplied by other sources, and

+ (D) such other information as will facilitate an effective audit.

o (2) For the purposes of this subsection, such records for a mature contract shall consist of quarterly financial statements for the purpose of accounting for Federal funds, the annual single-agency audit required by chapter 75 of title 31 and a brief annual program report.

* (b) Access to books, documents, papers, and records for audit and examination by Comptroller General, etc.

The Comptroller General and the appropriate Secretary, or any of their duly authorized representatives, shall, until the expiration of three years after completion of the project or undertaking referred to in the preceding subsection of this section, have access (for the purpose of audit and examination) to any books, documents, papers, and records of such recipients which in the opinion of the Comptroller General or the appropriate Secretary may be related or pertinent to the grants, contracts, subcontracts, subgrants, or other arrangements referred to in the

preceding subsection.

* (c) Availability by recipient of required reports and information to Indian people served or represented Each recipient of Federal financial assistance referred to in subsection (a) of this section shall make such reports and information available to the Indian people served or represented by such recipient as and in a manner determined to be adequate by the appropriate Secretary.

* (d) Repayment to Treasury by recipient of unexpended or unused funds

Except as provided in section 13a or 450j-1(a)(3) of this title, funds paid to a financial assistance recipient referred to in subsection (a) of this section and not expended or used for the purposes for which paid shall be repaid to the Treasury of the United States through the respective Secretary.

CONSTITUTION OF THE UNITED STATES
ARTICLE III--THE JUDICIARY
Section 2, Clause 1. Jurisdiction of Courts

Section 2. The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction;--to Controversies to which the United States shall be a Party;--to Controversies between two or more States;--between a State and Citizens of another State;--between Citizens of different States;--between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

The following, in order to save space, consists of excerpts from :

UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

United States of America, ex rel., Leon Braun,	**RE 99-13678 Case No. 98-6580-CIV-LENARD**
Plaintiff	**Magistrate Stephen T. Brown**
vs.	
Seminole Tribe of Florida Inc., and Seminole Tribe of Florida Defendants	

PETITION FOR REHEARING

Dated Sept. 15, 2000

SUBMITTED ON BEHALF OF APPELLANT
Leon Braun
3150 N. 36th St
Hollywood, Fl. 33021
(954) 963- 4949

STATEMENT OF THE ISSUES

The Seminole Tribe of Florida and Tribe, Inc. take the position that they can not be sued unless (1) Congress has specifically abrogated tribal sovereign immunity within the FCA; or (2) the immunity of the tribal defendants from suit have been waived through the deliberate acts of their respective governing bodies, sitting in legal session.[1]

The Eleventh Circuit District Court took the position "because the 'unique trust relationship between the United States and the Indians,' where the Indian rights are at issue, ambiguities in federal laws must be resolved to the Indians' advantage". The Court therefore finds that Congress did not expressly abrogate tribal sovereign immunity within the FCA.'...Without a clear intent to waive tribal sovereign immunity either by Congress in the FCA or by Defendants themselves, the Court lacks subject matter jurisdiction to hear this matter. ([2])

The District court cites Florida Paraplegic to support their argument.

The Eleventh Circuit Appellate Court simply states: "Given the lack of pertinent, unequivocal, and expressed waiver of tribal immunity, the district court did not err in dismissing Braun's complaint for want of subject matter jurisdiction, based upon the doctrine of sovereign immunity.

The Appellate court then cites "Florida v. Seminole Tribe, 181 F.3d 1237, Miccosukee Tribe of Indian, 166 F.3d 1126 and Maryland Casualty Co. V. Citizens Nat'l Bank.[3]

****

[1] Taken from page 7-Answer Brief of Appellee), [2] Taken from pages 8 and 9 of the Dismissal by Joan A. Lenard, U.S.

District Judge., [3] Taken from August 2,2000 decision, page 2

****

Braun, for the U.S. Government takes, exception to all of the above positions.

This petition for a rehearing will:

1. Discuss the "doctrine of tribal sovereign immunity" and show where it is founded upon an anachronistic fiction that has capriciously been used, contrary to existing laws, violating common sense and our Constitution. We will also point out that each situation must be tested before tribal sovereign immunity can be accepted.

2. Discuss the various court referenced decisions in the Appeal Court's denial of our appeal. We will highlight those areas where the court made conclusions based on assumptions which are in opposition to the facts and law available at that time, or have been proven wrong. We will show where the cases themselves are not relevant to this FCA case because the Constitution, existing law, and last but not least, common sense forbids it.

3. Discuss the False Claims Act case by itself to show there is no ambiguity, no immunity, and the intent of the law is clear.

4 Conclude by listing the errors made in the past decisions and state why the decision to dismiss for subject matter jurisdiction was in error, and request the Appellate court order the Federal Court accept their responsibility and try this case.

****

(Taken from page 11 or reappeal)

It follows that whatever immunity is granted to the Indian tribes, Congress, not the Courts, has the responsibility to decide. The Court's function is to follow the existing law.

From *Court v. Ash, 422 U.S. 66, 95 S. Ct. 2080, 45 L. Ed. 2d 26 (1975),*

> *The governing rule was announced by Mr. Chief Justice Marshall in United States v. Schooner Peggy, 1 Cranch 103, 110 (1801):*
> *" It is in the general true that the province of an appellate court is only to enquire whether a judgement when rendered was erroneous or not, but if subsequent to the judgement and before the decision of the Appellate court, a law intervenes and positively changes the rule which governs, the law must be obeyed, or its obligation denied. If the law be constitutional, I know of no court which can contest its obligation...in such a case the court must decide according to existing laws, and if it be necessary to set aside a judgement, violation of law, the judgement must be set aside."*

****

(Taken from Page 20 or Reappeal)

There is not enough allowed space to quote all of CFR Title 25 which is very specific as to how to integrate the Indians into the American economy; controlling the budgeted funds; without violating non Indians, etc. . Unfortunately, too many situations arose wherein the courts, with misguided good intentions, ignored the Title 25 guide lines and gave blanket, capricious immunity to the Tribe. These rulings violated the non Indians and as a result, the growing tendency of non-Indians is to avoid doing business with the Indians, because the courts are not giving normal safeguards. Even the American banking society has a reluctancy to give loans to Indians when there are no safeguards. As a consequence, the press reports, the Indians are

forming their own bank. The same press reports state the new Indian Bank is for funding their own larger businesses, not to aid the individuals.

It is time the courts realize it is in the "best interest of the Indians' to instill a sense of values with the Indians that is in concert with the rest of this nation. If a financial wrong is done by an Indian to Indian or non Indian the guilty party should be held responsible in the same manner as all U.S. Citizens are. If that is done, in time, there will develop a confidence factor when doing business with Indians as in contrast to the high degree of distrust that the courts have encouraged with their decisions. It should also be understood, that Title 25 has funding and insurance available to the Indians so it would not be necessary to violate the non Indians or even Indians.

The courts' decisions, in the past, has added fuel to a modern anti-Indian movement which was created out of a non- Indian "backlash" against Indians since the 1960's. One major factor motivating the anti-Indian groups is the call for "equal rights for whites." .

****

(Taken from page 24 or Reappeal)

2. U.S. Government v. Seminole Tribe of Florida:

2.1 Change of Venue:

It is respectfully submitted, if allowed by the Appellate Court system, that the 11th District Appellate Court allow another Appellate Court review this appeal. We request this for the following reasons.

2.1.1. The 11th Circuit Appellate court denied our appeal without any response as to the reasons we stated in our appeal. Thus we have no way of knowing wherein our arguments are not acceptable.

2.1.2. The 11th Circuit Appellate court cited its own previous decisions. Other courts did not find the 11th Circuit Appellate courts decisions acceptable. We do not find those cited cases acceptable or germane. Details are discussed later in this presentation.
2.1.3. The 11th Circuit Appellate court developed it's own "right without remedy " posture to establish "sovereign immunity" for the Seminoles and Miccosukee. The "right without remedy " posture was also found to be in error. This is also elaborated on later in this presentation.

Because the 11th Circuit Appellate court repeatedly expresses their own pre-disposed attitude in "pattern and practice" related to sovereign immunity, and the 11th Circuit Appellate court would have to reverse their own rulings on past cases as related to immunity, or as a minimum reverse their expressed blanket philosophy of sovereign immunity, we question the possibility of an impartial ruling.
If a change of venue is not permitted, we beg the court accept the following on its merit.
****
(taken from page 26 of Reappeal)
2.4 Detailed discussion of the Florida Paraplegic v. Miccosukee and Florida V. Seminole Tribe are in section 3 and 4 of this paper.
It is shown (see section 3 Florida Paraplegic v. Miccosukee) that the 11th Circuit Court of Appeals' underlying reasons which were developed to grant Sovereign immunity were not in accordance with known facts or law at that time or since come to light. Braun cited cases (see section 3) from many other State's courts that were in opposition to the 11th District

Appellate ruling on identical situations. It was recommend that the 11th District Appellate Court reverse themselves. (see 3.5)
Similar arguments were presented for the Florida v. Seminole with the same recommendation to reverse themselves. (see section 4.)
Whether or not the 11th Circuit Court of Appeals reverses themselves, those cases have no relevance to this FCA case when related to immunity because this FCA case is a violation of our Constitution and Fraud against our Government. Those ingredients are not in the Paraplegic or Florida or Maryland case.
****
(taken from Page 27 Reappeal)
2.5 Discussion of the 11th District Courts ruling on the FCA case.
2.5.1 The 11th District Courts decision was based on "ambiguities in federal laws must be resolved to the Indians' advantage". This is a well intended phrase but not applicable for two major reasons. Firstly, there was no ambiguity (see 2.3.1); and secondly, it is not in the Indians best interest.
It is not in the Indians best interest because the very premise of this False Claims Act case is to account for the money which did not get to help the Indians. In other words, if the Seminole Tribe of Florida's way of life has not improved over the years, (this is published opinion.)where did the money go? It is the money that has been misdirected that is under question. Obviously it is in the "Indians Best Interest" to put the misdirected money back where it belongs. For example, what if certain individuals were taking the money for their own personal gains? This will all be brought to light and detailed after discovery. It is definitely to the

Indian's advantage to follow the guide lines set forth in CFR Title 25.

The word "ambiguity" as used related to "sovereign immunity" implies there may or may not be immunity. There are established tests such as the "three circumstances" rule (G) which will determine whether *(1) the case will abrogate rights guaranteed under a treaty, or (2) interfere with purely intramural matters touching exclusive rights of self government, or (3) contradict Congress intent.*

It is apparent there is no immunity to be granted when using these tests.

Justice Rehnquist ©) stated tribal sovereignty is limited in three ways:

> *Tribes are not permitted to exercise powers that are surrendered by treaty; and*
> *Tribes are not permitted to exercise powers that are prohibited by federal statute; and*
> *Tribes are not permitted to exercise powers that are inconsistent with their status of a domestic dependant nation.*

It is apparent there is no immunity to be granted when using these tests.

****

(Taken from page 27 reappeal)

2.5 Discussion of the 11th District Courts ruling on the FCA case.

2.5.1 The 11th District Courts decision was based on *"ambiguities in federal laws must be resolved to the Indians' advantage"*. This is a well intended phrase but not applicable for two major reasons. Firstly, there was no ambiguity (see 2.3.1); and secondly, it is not in the Indians best interest.

It is not in the Indians best interest because the very

premise of this False Claims Act case is to account for the money which did not get to help the Indians. In other words, if the Seminole Tribe of Florida's way of life has not improved over the years, (this is published opinion.)where did the money go? It is the money that has been misdirected that is under question. Obviously it is in the "Indians Best Interest" to put the misdirected money back where it belongs. For example, what if certain individuals were taking the money for their own personal gains? This will all be brought to light and detailed after discovery. It is definitely to the Indian's advantage to follow the guide lines set forth in CFR Title 25.

The word "ambiguity" as used related to "sovereign immunity" implies there may or may not be immunity. There are established tests such as the "three circumstances" rule (G) which will determine whether (1) the case will abrogate rights guaranteed under a treaty, or (2) interfere with purely intramural matters touching exclusive rights of self government, or (3) contradict Congress intent. It is apparent there is no immunity to be granted when using these tests.

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> *Tribes are not permitted to exercise powers that are inconsistent with their status of a domestic dependant nation.*

It is apparent there is no immunity to be granted when using these tests.

2.6 Then on what basis do we grant immunity?

The 11th Circuit Court of Appeals ruling states *" Given the lack of pertinent, unequivocal, and expressed waver of tribal immunity"* is a reason to grant immunity. Yet the same 11th Circuit Court of Appeals, on page 8 of the Paraplegic V. Miccosukee, stated:

> *(21). See also United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir.1987) ("[It is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."*

This FCA suit is the U.S. Government suing an Indian Tribe. According to 11th Circuit Court of Appeals the Seminoles may not interpose its sovereign immunity against the United States.

2.7 The 11th Circuit Court of Appeals stated when discussing Tribal Sovereign Immunity on page 4 of the Paraplegic V. Miccosukee

> *.....Thus, the Supreme Court has allowed the federal government to enforce with respect to Indians laws concerning, for example, federal income taxes and confiscation of land for federal projects, on the rationale, discussed supra Part III.A, that Congress meant the laws under which the federal agencies were acting to apply to Indians because they were "general statutes in terms applying to all persons" that did not explicitly exclude Indians.(9) Tuscarora, 362 U.S. at 116, 80 S.Ct. at 553. (accent added)*

The 11th Circuit Court of Appeals in the above statement acknowledges that there are statutes that apply to "all" and do not exclude Indians. The False Claims Act is such a statute and includes everybody. Even the States, when tested by the Supreme Court, are

not immune. There is no specific type of defendant and no exceptions..

> *It follows the approach of United States v. Douglas, 626 F.9 Supp. 621 (E.D. Va. 1985), which broadly reads the FCA as intended "to reach all types of fraud that result in immediate financial loss to the government."* (accent added)

2.8 The 11th Circuit Court of Appeals stated when discussing Tribal Sovereign Immunity of the Paraplegic V. Miccosukee

> *(6). As we held in Part III.A, supra, Title III applies to Indian tribes; moreover, "[tribal sovereign immunity does not bar suits by the United States." Reich v. Mashantucket Sand & Gravel, 95 F.3d 174, 182 (2d Cir.1996) (citing Quileute Indian Tribe v. Babbitt, 18 F.3d 1456, 1459-60 (9th Cir.1994) (observing that "tribal sovereignty does not extend to prevent the federal government from exercising its superior sovereign powers").* (accent added)

There is no doubt the 11th Circuit Court of Appeals recognizes the right of the Government to exercise its sovereign powers. We repeat, this is the U.S. Government suing the Seminole Tribe of Florida and Inc., all of whom are designated Indians.

****

(Taken from Page of Reappeal)

2.9 The United States Constitution , Section 9. (See M) Our Constitution demands that all moneys be accounted for. If the Courts decide that the Indians do not have to account for the moneys taken from our treasury, it would be a violation of our Constitution. To dismiss this case will allow those guilty ones to confiscate moneys meant for better purposes. This

could go on endlessly depriving those in need, until the Supreme Court reverses. But the damage done in the time it takes for such a reversal is in itself a crime against the people.

2.10 Summation:

2.10.1 The Government did abrogate the Seminole Tribe of Florida's immunity relating to the Constitution, Federal and State laws when granting them their charter. (See J, 1.8, 2.3.1)

2.10.2 The Seminole Tribe of Florida did waive immunity to all Federal and State laws when submitting their signed Constitution in order to be approved. (See J, 1.8. 2.3.1)

2.10.3 There is no ambiguity in law or intent. Congress has designated 25 CFR just for Indians. Congress made it very clear as to what rules pertain to the Indians.

2.10.4 It is to the advantage of the Indian general population that 25 CFR be adhered to.

This FCA case would assure the Indian population would be protected as an outcome of discovery. (See 2.5.1)

2.10.5 This FCA case will assure the intent of the Constitution, related to money, is carried out. (See 2.9, M)

2.10.6 The superior power of the United States over the Indian tribes is such that a tribe may not interpose its sovereign immunity against the United States.(See 2.6,2.7)

2.11 Conclusion;

It is respectfully submitted, in accordance with Plain Error Doctrine (see D), **that the 11th Circuit Court of Appeals reverse their previous decision and direct the**

District Court to continue.
Submitted on this Sept. 15, 2000

Leon Braun, Realtor/Plaintiff

CERTIFICATE OF SERVICE

I hereby certify that I caused copies of the foregoing to be served by first class mail, postage prepaid, to the following:

_____

Leon Braun
Relator for the U.S. Government
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December 15, 2000

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Atlanta, Georgia

Supreme Court, U.S.
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No. 00-1223

In The

Supreme Court of the United States

UNITED STATES OF AMERICA, ex rel. LEON BRAUN,

Petitioner,

v.

SEMINOLE TRIBE OF FLORIDA, INC., AND SEMINOLE TRIBE OF FLORIDA,

Respondents.

On Petition For A Writ Of Mandamus To The United States Court Of Appeals For The Eleventh Circuit

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QUESTION PRESENTED

There is really only one question presented in this case: Whether the district court has subject matter jurisdiction to consider a claim brought by an individual *qui tam* relator in the name of the United States against a federally recognized Indian tribe under 25 U.S.C. § 476 and a federally chartered tribal corporation under 25 U.S.C. § 477 for claims allegedly arising under the *False Claims Act of 1986,* 31 U.S.C. §§ 3729-30 et seq.

Stated another way, the petitioner asks this Court whether a federally recognized Indian tribe and a federally chartered tribal corporation are immune from suit under the doctrine of tribal sovereign immunity in connection with a claim brought by an individual *qui tam* relator in the name of the United States under the *False Claims Act of 1986,* 31 U.S.C. §§ 3729-30 et seq.

In his Petition for Writ of Mandamus, Leon Braun, purporting to act as *qui tam* relator and counsel to the United States of America has set forth eight separate disjointed questions, each of which are embraced by the questions presented herein.

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STATEMENT OF THE CASE

Leon Braun (Braun), purporting to act as a *qui tam*[1] relator and "counsel" to the United States of America, has filed a Petition for Writ of Mandamus seeking to have this Court compel the panel of the United States Court of Appeals for the Eleventh Circuit to reverse its judgment affirming a final order of dismissal for lack of subject matter jurisdiction rendered on August 31, 1999 by the United States District Court for the Southern District of Florida (Judge Joan A. Lenard) in connection with a claim arising under the *False Claims Act of 1986* (FCA) which was brought by Leon Braun, as a private individual *qui tam* relator, against the Seminole Tribe of Florida, a federally recognized Indian tribe and Seminole Tribe of Florida, Inc., a federally chartered tribal corporation.[2]

As a preliminary matter, Braun incorrectly assumes that the reversal of the panel decision of the United States

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[1] "Qui tam" is short for "qui tam pro domino rege quam pro se imposo sequitur," which in English means "who brings the action as well for the king as for himself." *Kelly v. Boeing Co.*, 9 F.3d 743, 746 n.3 (9th Cir. 1993).

[2] Pursuant to Rule 15.2 of the Rules of the Supreme Court of the United States, two fundamental misstatements contained in the petition are noteworthy at the outset. First, Leon Braun has captioned this case solely in the name of the United States instead of in his capacity as an individual *qui tam* relator. The misleading caption should be corrected to reflect the petitioner as United States of America ex rel. Leon Braun, Relator – the same caption used by Braun in the Eleventh Circuit. Secondly, on page 1 of the petition, Braun refers to himself as "counsel/relator" to the United States. To the best knowledge of the undersigned, Braun is not now, nor has he ever been, an attorney at law in any jurisdiction.

Court of Appeals for the Eleventh Circuit affirming the final order of the United States District Court for the Southern District of Florida dismissing the claim brought by Braun in the name of the United States under the FCA is a ministerial duty subject to a writ of mandamus. Rule 20.1 of the Rules of the Supreme Court of the United States makes clear that issuance by the Court of an extraordinary writ authorized by 28 U.S.C. § 1651(a) is not a matter of right, but of discretion sparingly exercised. In order to justify the issuance of such a writ, the petitioner must show, among other things, that adequate relief cannot be obtained in any other form. In this case, it is clear that Braun could have filed a petition for writ of certiorari in accordance with Rule 14 of the Rules of the Supreme Court of the United States.

Braun's petition fails to set forth a cogent statement of either the facts or the case leading up to the filing of his petition. Accordingly, a statement of the facts and of the case is set forth below:

1. Background and Procedural History:

On June 5, 1998, Braun, as relator, brought a *qui tam* action against the Seminole Tribe of Florida (Seminole Tribe) and Seminole Tribe of Florida, Inc. (Tribe Inc.) arising under the *False Claims Act* of 1986 (FCA), 31 U.S.C. §§ 3729-30 *et seq.* In his complaint, Braun claims that the Seminole Tribe is responsible for certain unlawful actions which he claims " . . . include but are not limited to" the following:

> Causing to be presented to an officer or employee of the United States Government a

> false or fraudulent claim for payment or approval;
>
> Knowingly making or causing to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the Government;
>
> Having possession, custody, or control of public property or money used, or to be used, by the government and, intending to defraud the Government or wilfully to conceal the property, delivers, or causes to be delivered, less property than the amount for which the person receives a certificate or receipt; and
>
> Making, using or causing to be made or used, a false record or statement to conceal, avoid or decrease an obligation to pay or transmit money or property to the Government.
>
> (Complaint at ¶ 16)

In his complaint, Braun contends, as he does in his petition, that the district court has subject matter jurisdiction arising under 31 U.S.C. § 3732 to consider his *qui tam* action against the Seminole Tribe and Tribe Inc. (Complaint at ¶ 4). Having reviewed Braun's once sealed complaint, the federal government elected not to intervene.

In his complaint, Braun alleges that the Seminole Tribe and Tribe Inc. received significant sums of money from the federal government which is intended to help the Seminole Tribe . . . "help itself" (Complaint at ¶ 5) and that any and all expenditures of the Seminole Tribe are to be " . . . monitored and approved by the Department of the Interior, through the Bureau of Indian Affairs." (Complaint at ¶ 6). Braun alleges that in order to

facilitate the federal government's monitoring process, the Seminole Tribe is required to provide the Bureau of Indian Affairs (BIA) with a periodic accounting of tribal expenditures which, according to Braun, is a precondition to the receipt of federal funding. Braun claims that the Seminole Tribe and Tribe Inc. have failed to account to the BIA " . . . or to account accurately" their expenditures and have deliberately or recklessly made and used false records in order to obtain approval for additional governmental funding. (Complaint at ¶¶ 8 & 9). In his complaint, Braun asserts that he has requested copies of the accounting reports submitted by the Seminole Tribe to the BIA but has allegedly discovered that the BIA is not in possession of such reports.

In his complaint, Braun goes on to assert that as a further condition to governmental funding, the Seminole Tribe is required to submit annual outside audits of gaming revenues to the federal government which are calculated to demonstrate that there are no expenditures contrary to the requirements of Title 25 C.F.R., Chapter 39. (Complaint at ¶ 11). Braun further contends that he has also requested copies of these audit reports from the BIA but has learned that no such reports have been submitted by the Seminole Tribe. (Complaint at ¶¶ 12 & 13).[3]

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[3] With respect to Tribe Inc., it should respectfully be noted that Tribe Inc.'s business operations are confined primarily to agriculture, citrus, tobacco and cattle. Tribe Inc. operates separately and distinctly from the Seminole Tribe with a Board of Directors having a total composition that is different from that of the Tribal Council of the Seminole Tribe. It also has its own budget. Moreover, at no time and under no circumstances

In ¶ 14 of the complaint, Braun contends that the Seminole Tribe's " ' . . . failure to submit annual audit reports of gaming revenues causes a false record to exist . . . ' and thereby causes inappropriate approval by the federal government of funding to the 'Tribal Defendant.' "

On March 3, 1999, the Seminole Tribe filed a motion to dismiss for lack of subject matter jurisdiction based upon tribal sovereign immunity. In their motions[4] the Seminole Tribe and Tribe Inc. took the position that they cannot be sued unless: (1) Congress has specifically abrogated tribal sovereign immunity within the FCA; or (2) the immunity of the tribal defendants from suit has been waived through the deliberative acts of their respective governing bodies, sitting in legal session. In support of its dispositive motion, the Seminole Tribe filed the unrefuted affidavits of Max B. Osceola, Jr., a member of the Tribal Council of the Seminole Tribe, together with the affidavit of Mary Jane Willie, the Official Tribal Clerk of the Seminole Tribe. Attached to these unrefuted defense affidavits

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has Tribe Inc. ever had any interest in the gaming operations of the Seminole Tribe which have been operated as a subordinate governmental unit of the Tribe itself. The revenues of tribal gaming are, as a practical matter, a tax substitute since tribal taxation is insufficient to support the governmental operations of the Tribe and gaming revenues are used in large part for that purpose as well as to support tribal membership. These facts were established conclusively for the purpose of this case before the district court in the unrefuted affidavit of Max B. Osceola, Jr., a member of the Tribal Council of the Seminole Tribe of Florida.

[4] Tribe Inc. joined in the Seminole Tribe's motion on March, 9, 1999.

is a copy of Tribal Ordinance C-01-95 which is the Tribal Sovereign Immunity Ordinance of the Seminole Tribe which was duly enacted by the Tribal Council of the Seminole Tribe on March 16, 1995 and unconditionally approved by the United States Department of the Interior on April 19, 1995. This Tribal Ordinance restates, as a matter of law, that tribal sovereign immunity is applicable not only to the Seminole Tribe and its subordinate governmental units but to its officials, employees and authorized agents as well. It reads, in pertinent part, as follows:

> NOW THEREFORE BE IT ORDAINED: that the Seminole Tribe of Florida, its subordinate economic and governmental units as well as its tribal officials, employees and authorized agents are immune from suit brought by any third-party in any state or federal court absent the clear, express and unequivocal consent of the Seminole Tribe of Florida or the clear, express and unequivocal consent of the United States Congress. This immunity shall apply whether the Tribe or any subordinate economic or governmental unit is engaged in private enterprise or governmental function; and
>
> BE IT FURTHER ORDAINED: that all tribal officials, employees or other authorized agents shall likewise be immune from suit brought by any third-party in any state or federal court where such tribal official, employee or other authorized agent is either acting on behalf of the Seminole Tribe of Florida in the course of their agency or where the acts of such tribal official, employee or other agent, though mistaken, negligent or otherwise improper are within that degree of authority which the Seminole Tribe of

> Florida is capable of bestowing upon the agent as a matter of federal, constitutional or tribal law;. . . .

On March 17, 1999, Braun filed a response to the Seminole Tribe's motion stating that the FCA does not explicitly immunize tribal groups from being sued. In support of his position, Braun, among other things, contends that the *Major Crimes Act* expressly states that " . . . the general laws of the United States as to the punishment of offenses committed in any place within the sole and exclusive jurisdiction of the United States, except of the District of Columbia, shall extend to the Indian country." *Major Crimes Act*, 18 U.S.C. § 1152. From this, it appears that Braun deduces what he perceives is a Congressional mandate that permits him to sue tribal defendants civilly in federal court under the FCA because they allegedly violated the Major Crimes Act. Braun further appears to maintain that the issue of a tribal waiver of sovereign immunity is irrelevant because the Seminole Tribe and Tribe Inc. are allegedly not immune under the *Major Crimes Act*.

In support of their motions to dismiss for lack of subject matter jurisdiction, Seminole Tribe and Tribe Inc. submitted unrefuted evidence that there is no resolution, ordinance, or other official document or record evidencing any voluntary consent or waiver on the part of the Seminole Tribe or Tribe Inc. to be sued in any civil or other action by a *qui tam* relator under the FCA. In addition to the complete absence of any voluntary waiver of sovereign immunity as to the Seminole Tribe or Tribe Inc., there is no applicable federal statute enacted pursuant to the plenary power of Congress which clearly and

unmistakably abrogates tribal immunity so as to permit respondents to be subject to cases brought by *qui tam* plaintiffs – purporting to do the government's business as "private attorneys general" – in violation of the government-to-government trust relationship that exists between Indian tribes and the federal government for the benefits of tribes. Nowhere in any brief or other submission in the record does Braun appear to refute the concern expressed by the Seminole Tribe that if FCA litigation is permitted, such litigation could consume the limited asset and revenue base of the tribal entities in perpetual defense of such actions, no matter how frivolous.

On March 24, 1999, the Seminole Tribe filed its reply in support of its motion to dismiss for lack of subject matter jurisdiction.[5] On August 31, 1999, the district court granted the tribal defense motions to dismiss for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity and the inapplicability of the FCA to Indian tribes and tribal entities.

Braun timely filed a notice of appeal in the United States Court of Appeals for the Eleventh Circuit seeking to challenge a final order of the United States District Court for the Southern District of Florida dismissing Braun's complaint against the Seminole Tribe and Tribe Inc. for lack of subject matter jurisdiction based upon their immunity from suit under the doctrine of tribal sovereign immunity. Following the submission of briefs

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[5] Tribe Inc. joined in the reply on March 26, 1999.

and a *de novo* review of the issue of respondents' sovereign immunity from suit, the Eleventh Circuit issued an unpublished *per curium* opinion affirming the final order of the district court. In its unpublished opinion, the Eleventh Circuit panel stated:

> Leon Braun appeals *pro se* the district court's dismissal of his claim against the Seminole Tribe of Florida, Inc., chartered in 1957, and the Seminole Tribe of Florida, under the False Claims Act, 31 U.S.C. §§ 3729-33. Given the lack of a pertinent, unequivocal, and expressed waiver of tribal immunity, the district court did not err in dismissing Braun's complaint for want of subject matter jurisdiction, based upon the doctrine of tribal sovereign immunity. [G]enerally,(sic) *Florida v. Seminole Tribe*, 181 F.3d 1237 (11th Cir. 1999), *Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians*, 166 F.3d 1126 (11th Cir. 1999), and *Maryland Casualty Co. v. Citizens National* (sic) *Bank*, 361 F.2d 517, 520-21 ([5]th Cir. 1966). (sic)
>
> AFFIRMED.

A judgment of affirmance was rendered by the Clerk of the United States Court of Appeals for the Eleventh Circuit. Following the denial of Braun's timely motion for rehearing, the court thereafter reissued its judgment as a mandate on November 7, 2000. This petition for mandamus to the Eleventh Circuit panel follows in this Court.

REASONS FOR DENYING THE PETITION FOR WRIT OF MANDAMUS

The panel of the United States Court of Appeals for the Eleventh Circuit properly exercised its discretion in

affirming the final order of the district court which dismissed Braun's complaint against the Seminole Tribe and Tribe Inc. This decision, following a *de novo* review, was in no way ministerial but involved the court's exercise of proper judicial discretion and analysis by the panel in determining whether the district court lacked jurisdiction over the Seminole Tribe and Tribe Inc. under the doctrine of tribal sovereign immunity in connection with a case purportedly arising under the FCA. In this regard, there does not appear to be a proper basis for Braun to seek a writ of mandamus against the members of the panel who affirmed the final order of the district court. In the event that this Court should construe Braun's petition for writ of mandamus to be a petition for writ of certiorari to the Eleventh Circuit Court of Appeals, the respondents have set forth below additional reasons why the writ should not be granted.

The district court properly dismissed Braun's claim arising under the FCA for lack of subject matter jurisdiction based upon the doctrine of tribal sovereign immunity. "Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58 (1978). Accordingly, a suit against an Indian tribe must be barred unless the tribe has clearly waived its immunity or Congress has expressly abrogated that immunity by authorizing the suit. *See, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.*, 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe*, 498 U.S. 505, 509 (1991); *State of Florida v. Seminole Tribe of Florida*, 181 F.3d 1237, 1241, (11th Cir. 1999); and *Florida Paraplegic Assoc.*,

Inc. v. Miccosukee Tribe of Indians, 166 F.3d 1126, 1130-1131 (11th Cir. 1999).

The federally recognized tribal sovereignty of Indian tribes lies at the heart of the special and unique relationship that exists between the United States and Indian tribes: that of a conquering sovereign to a conquered sovereign. This relationship has been defined as most akin to that of a guardian to its ward, as stated by Chief Justice John Marshall in *Cherokee Nation v. Georgia*, 30 U.S. (5 Pet.) 1, 17 (1831):

> Meanwhile, they are in a state of pupilage; their relationship to the United States resembles that of a ward to his guardian.

Fifty years later, this Court redefined the relationship between the United States and Indian tribes in the same vein when it stated:

> These Indian tribes are the wards of the nation. They are communities *dependent* on the United States, – dependent largely for their daily food; dependent for their political rights. They owe no allegiance to the states, and receive from them no protection. Because of the local ill feeling, the people of the states where they are found are often their deadliest enemies. From their very weakness and helplessness, so largely due to the course of dealing of the federal government with them and the treaties in which it has been promised, there arises the duty of protection, and with it the power. This has always been recognized by the executive, and by congress, and by this court, whenever the question has arisen.

United States v. Kagama, alias Pactah Billy, an Indian, 118 U.S. 375, 384-385 (1886); *see also, United States v. Sandoval,* 231 U.S. 28 (1913).

It is clear from the unrefuted evidence in the record that there is no tribal waiver or Congressional abrogation of tribal immunity in this case. In fact, under no circumstances has the Tribal Council of the Seminole Tribe or the Board of Tribe Inc. – through any deliberative act while sitting in legal session or otherwise – voluntarily agreed to be subject to suit in any court for claims arising under the FCA. Thus, the only remaining question is whether Congress, in enacting the FCA intended for the Act to reach the conduct of Indian tribes and federally chartered tribal corporations.

It is well settled that "Congress abrogates tribal immunity only where the definitive language of the statute itself states an intent either to abolish Indian tribes' common law immunity or to subject tribes to suit under the Act." *State of Florida v. Seminole Tribe of Florida,* 181 F.3d 1237, 1241-1242 (11th Cir. 1999); *quoting from Florida Paraplegic Assoc., Inc. v. Miccosukee Tribe of Indians of Florida,* 166 F.3d at 1131. For reasons more fully hereinafter set forth, it is clear that no such Congressional abrogation exists that is applicable to this case.

Indian tribes have always been considered to have an immunity from suit similar to that enjoyed by the federal government. *Namekagon Development Company v. Bois Forte Reservation Housing Authority,* 517 F.2d 508, 510 (8th Cir. 1975). Moreover, since an Indian tribe's sovereign immunity is coextensive with that of the United States, a party may not maintain a claim against an Indian tribe or

any of its subordinate governmental units or agents absent a firm showing of an effective waiver which is *unequivocally* expressed. *Ramey Construction Company, Inc., v. Apache Tribe of Mescalero Reservation*, 673 F.2d 315, 319-321 (10th Cir. 1982). A waiver of tribal sovereign immunity may *never* arise by implication against an Indian tribe or any of its subordinate units or its agents. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

In this case, Braun has suggested throughout that Congress intended to make the FCA applicable to Indian tribes because Congress allegedly made the *Major Crimes Act* applicable to Indian tribes. As Braun should be well aware, neither a waiver nor an abrogation of tribal immunity may arise by implication against an Indian tribe. If a waiver or abrogation of tribal sovereign immunity exists – by the Tribe or by Congress – the waiver or abrogation must be clear, express and unmistakable. *United States v. Dion*, 476 U.S. 734, 738-739 (1986). No such abrogation or waiver exists in this case.

In addressing the Seminole Tribe's entitlement to immunity from suit under the doctrine of tribal sovereign immunity, the courts have refused to distinguish whether the Tribe (or a federally chartered tribal corporation) is engaged in a private enterprise or governmental function. *Maryland Casualty Company v. Citizens National Bank of West Hollywood*, 361 F.2d 517, 520-521 (5th Cir. 1966). In *Maryland Casualty Company*, it was held that the Seminole Tribe's agent, Tribe Inc., a federally chartered tribal corporation, was equally immune from suit while engaged in a private commercial enterprise – a position that continues to receive widespread recognition. *Askew v. Seminole Tribe of Florida, Inc.*, 474 So.2d 877 (Fla. 4th DCA

1985). *See also, American Indian Agriculture Credit Consortium, Inc. v. Standing Rock Sioux Tribe*, 780 F.2d 1374, 1378 (8th Cir. 1985).

Sovereign immunity is a right of the sovereign. The doctrine goes to the power of the court and not to the subject matter of the dispute. As the Ninth Circuit said in *State of California v. Quechan Tribe of Indians*, 595 F.2d 1153 (9th Cir. 1979), "Sovereign immunity involves a right which courts have no choice, in the absence of a waiver, but to recognize. It is not a remedy. . . . " *Id.* at 1155.

On May 22, 2000, this Court, in the case of *Vermont Agency of Natural Resources v. United States ex rel. Stevens*, 529 U.S. 765 (2000), reversing *United States of America ex rel. Jonathan Stevens, qui tam and as relator v. The Vermont Agency of Natural Resources*, 163 F.3d 195 (2d Cir. 1998), held that the FCA does not subject a state or state agency to liability in such actions. In fact, in that case, this Court expressly rejected the Second Circuit's holding that a state or state agency is a "person" subject to *qui tam* liability under 31 U.S.C. § 3729(a) of the FCA which subjects to liability "[a]ny person" who, *inter alia*, "knowingly presents or causes to be presented, to an officer or employee of the United States Government . . . a false or fraudulent claim for payment or approval." Although federally recognized Indian tribes are not ordinarily recognized as states or state agencies[6] it is well settled that Indian tribes are recognized as dependent political sovereign governments possessing common law immunity

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[6] Congress has, on occasion recognized Indian tribes to be deemed to be states for certain limited purposes. See, e.g., 26 U.S.C. § 7871.

from suit traditionally enjoyed by sovereign powers. *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998); *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe,* 498 U.S. 505, 509 (1991); *Santa Clara Pueblo v. Martinez,* 436 U.S. 49, 58-59 (1978). As dependent sovereign governments, Indian tribes have been held to have a status that is unique from all other forms of sovereign governments giving tribes " . . . a status higher than that of a State." *Native American Church v. Navajo Tribal Council,* 272 F.2d 131, 134 (10th Cir. 1959).

The language of the FCA, as set forth in 31 U.S.C. § 3729 *et seq.*, does not disclose on its face, or anywhere in its legislative history, any clear or unmistakable Congressional intention to abrogate tribal sovereign immunity in order to apply the Act to sovereign Indian tribes. Nowhere is there any reference to the FCA being applicable to Indian tribes. In passing the FCA, Congress could have easily exercised its plenary power over Indian tribes to include Indian tribes within the definition of a "person" and applied the Act as a limitation upon tribal sovereignty. Congress could have also easily expressed an intention to permit federal and state courts to assume jurisdiction over resident Indian tribes in civil disputes arising under the FCA. It chose not to do so.

Congress clearly had the benefit of *Worcester v. Georgia,* 31 U.S. (6 Pet.) 515 (1832); and *Cherokee Nation v. Georgia,* 30 U.S. (5 Pet.) 1 (1831), when it passed the FCA during the Lincoln Administration. Further, Congress had the benefit of a rich bloodline of this Court's decisions requiring unmistakable clarity in the abrogation of tribal sovereign immunity when it revised the FCA in 1986. *Santa Clara Pueblo v. Martinez,* 436 U.S. 49 (1978).

Congress was clearly aware of its plenary power over Indian tribes and how to exercise it; nevertheless, it omitted all references to Indian tribes in the FCA and all revisions to it. Thus, the language of the FCA, and its unmistakable omission of any reference to Indian tribes, makes it clear that Congress did not intend the statute to abrogate tribal sovereign immunity.

In order for Braun's claim to be upheld, he must demonstrate, among other things, that the term "person" (i.e., the one liable for making a false claim) in Section 3729(a) of the FCA includes sovereign Indian tribes and federally chartered tribal corporations. In that respect, Braun has "no little burden" because the statute does not define the term "person" and, as this Court has remarked before, "in common usage 'person' does not include the sovereign [and] statutes employing the [word] are ordinarily construed to exclude it." *See, United States of America ex rel. Long v. SCS Business and Technical Institute, Inc.*, 173 F.3d 870 (D.C. Cir. 1999) *quoting from, Will v. Michigan Department of State Police*, 491 U.S. 58, 64 (1989); *also quoting from Wilson v. Omaha Indian Tribe*, 442 U.S. 653, 667 (1979) and *United States v. Cooper Corp.*, 312 U.S. 600, 604 (1941). On this basis alone, it would appear tenuous at best to suggest that Congress intended the FCA to apply to tribal sovereigns.

Even if the language contained in the FCA is found to create an ambiguity as to whether Congress intended to apply the FCA to federally recognized Indian tribes, such ambiguity must *always* be resolved in favor of the tribal sovereign since it is well settled as a canon of construction that any ambiguities or doubtful expressions in statutes regarding Indian tribes are to be liberally construed

and resolved in favor of the tribes. *Cotton Petroleum Corp. v. New Mexico*, 490 U.S. 163, 178 (1989); *United States v. Santa Fe Pacific Railroad Company*, 314 U.S. 339, 354 (1941); *United States v. Truckee-Carson Irrigation District*, 649 F.2d 1286, 1298 (9th Cir. 1981). *See also, Bryan v. Itasca County*, 426 U.S. 373 (1976).

"The canons of construction applicable in Indian law are rooted in the unique trust relationship between the United States and the Indians," *County of Oneida v. Oneida Indian Nation of New York*, 470 U.S. 226, 247 (1985). Because Congress' authority to legislate unilaterally on behalf of the Indians derives from the presumption that Congress will act with benevolence, courts "have developed canons of construction that treaties and other federal action should, when possible, be read as protecting Indian rights and in a manner favorable to Indians." F. Cohen, *Handbook of Indian Law* at 221 (1982 Ed.). "Doubtful expressions are to be resolved in favor of the [Indians]." *United States v. Nice*, 241 U.S. 591, 599 (1916). "Ambiguities in federal law have been construed generously in order to comport with . . . traditional notions of sovereignty and with the federal policy of encouraging tribal independence." *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143-144 (1980).

By way of analogy, the case of *EEOC v. Fond du Lac Heavy Equipment and Construction Co., Inc. and Fond du Lac Band of Lake Superior Chippewa*, 986 F.2d 246 (8th Cir. 1993) examined the question of whether the *Age Discrimination in Employment Act* (ADEA) should be held to be applicable to Indian tribes given the fact that Indian tribes are not mentioned anywhere in either the language of the statute or its legislative history. In that case, the EEOC, an

agency of the federal government, sought to enforce the ADEA against a federally recognized Indian tribe and one of its tribal businesses in connection with the denial of employment to a prospective employee because of his age. Following *EEOC v. Cherokee Nation*, 871 F.2d 937 (10th Cir. 1989), the court found that Congress did *not* intend the ADEA to apply to Indian tribes. In that regard, the court noted as follows:

> . . . Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess . . . The question presented in this case is whether Congress did so when enacting the ADEA.
>
> The Supreme Court has stated that "general acts of Congress apply to Indians as well as to all others in the absence of a clear expression to the contrary." . . . (citation omitted) This general rule in *Tuscarora*, however, does not apply when the interest sought to be affected is a specific right reserved to Indians (citation omitted) . . . Specific Indian rights will not be deemed to have been abrogated or limited absent a "clear and plain" Congressional intent . . . (citations omitted). A clear and plain intent may be demonstrated by an "express declaration" in the statute, by the "legislative history" and by "surrounding circumstances." *Dion*, 476 U.S. at 739.
>
> * * *
>
> Because the Tribe's specific right of self-government would be affected, the general rule of applicability does not apply. . . .

986 F.2d at 247-249.

In *Kimel v. State of Florida Board of Regents*, 139 F.3d 1426 (11th Cir. 1998), *aff'd* 528 U.S. 62 (2000), this Court, using a similar analysis to that employed in *United States v. Dion*, 476 U.S. 734 (1986), was called upon to determine whether Congress intended to abrogate Eleventh Amendment immunity to states in connection with certain employment discrimination statutes. Citing this Court's decision in *Blachford v. Native Village of Noatak and Circle Village*, 501 U.S. 775 (1991), the Eleventh Circuit noted, *inter alia*, that before Eleventh Amendment immunity can be successfully abrogated:

> . . . Congress must have intended to abrogate that immunity by providing "a clear legislative statement" of its intent – "making its intention unmistakably clear in the language of the statute."

Kimel, 139 F.3d at 1430.

None of the statutes in question contained an unequivocal expression of an intent to abrogate immunity with unmistakable clarity. This analysis becomes particularly important in view of this Court's pronouncement that a waiver of tribal sovereign immunity – whether by tribal act or congressional abrogation – may not arise by way of implication. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 58-59 (1978).

On May 26, 1998, this Court made its most recent, and arguably significant pronouncement on the issue of tribal sovereign immunity in the case of *Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc.* 523 U.S. 751 (1998). In that case, this Court acknowledged that the entitlement of Indian tribes to immunity from suit under

the doctrine of tribal sovereign immunity falls within the plenary power of Congress and that absent an unmistakably clear congressional declaration abrogating or limiting the entitlement of an Indian tribe to sovereign immunity, suits against Indian tribes under circumstances where there is no tribal consent or congressional abrogation must be dismissed for lack of subject matter jurisdiction on the grounds of tribal sovereign immunity.

In his opening brief in the Eleventh Circuit, Braun purports to predicate subject matter jurisdiction for his civil FCA upon the criminal statutory language of the *Major Crimes Act* (18 U.S.C. § 1153) and the *Indian Country Crimes Act* (18 U.S.C. § 1152). Both of these statutes provide for *criminal* jurisdiction over individuals in federal courts relative to criminal acts arising in Indian country. Neither of these statutes creates a private cause of action against a governmental entity such as the Seminole Tribe or Tribe Inc. for the alleged violation of a civil statute such as the FCA.

In his petition for writ of mandamus, Braun cites as authority the case of *United States of America ex rel. Glenn A. Hall et al. v. Tribal Development Corporation*, 49 F.3d 1208 (7th Cir. 1995) (petition at 4 and 11) for the proposition that federal courts have considered *qui tam* actions involving Indian tribes prior to this case. What Braun neglects to tell this Court is that the *Hall* case was an action arising under 25 U.S.C. § 81 against a non-tribal Wisconsin corporation which sold goods to a gaming facility on reservation land. *Hall* did not involve a tribal entity and did not arise under the FCA. As such, it is distinguishable and inapplicable as noted in the comprehensive opinion by Judge Manion of the Seventh Circuit.

In short, the law cited by Braun is inapplicable to Indian tribes and certainly fails to grant, by implication or otherwise, any civil jurisdiction for claims purporting to arise under the FCA. In this case, Braun attempts, once again, by implication, to confer jurisdiction over alleged FCA violations raised by individual *qui tam* relators. However, Braun has failed to cite to any case to support a cognizable jurisdictional basis for a civil FCA claim against the tribal respondents brought by an individual *qui tam* relator without government participation.

CONCLUSION

Based upon the foregoing, it is respectfully submitted that neither the Seminole Tribe nor Tribe Inc. have consented to be sued under the FCA through the deliberative acts of their governing bodies. Additionally, nowhere in the FCA does there appear a clear and unmistakable intent of Congress to make the FCA applicable to sovereign Indian tribes.

It is respectfully submitted that the *de novo* review of the record by the United States Circuit Court of Appeals for the Eleventh Circuit correctly affirmed the district court's dismissal of Braun's complaint arising under the FCA for lack of subject matter jurisdiction based upon the

doctrine of tribal sovereign immunity. For this reason, its is respectfully submitted that Braun's petition for writ of mandamus to the panel should be denied.[7]

Respectfully submitted,

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[7] In the event that this Court should construe Braun's petition to be one of certiorari directed to the United States Court of Appeals for the Eleventh Circuit, it is respectfully submitted that for the same reasons, Braun's petition, as so construed, should likewise be denied.

(3)

Supreme Court, U.S.
FILED
MAR 20 2001
CLERK

No. 00-1223

In The

Supreme Court of the United States

*

United States of America

In re Leon Braun

Petitioner

v.

Seminole Tribe of Florida Inc., and Seminole Tribe of Florida

Respondent

*

PETITION FOR A WRIT OF MANDAMUS ON THE UNITED STATES COURT OF APPEALS, ELEVENTH CIRCUIT

*

REPLY TO RESPONDENT'S BRIEF IN OPPOSITION

*

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Dated: March 20, 2001

18 pp

1. QUESTIONS in the Petition for Mandamus.

1. Whether mandamus should issue to the United States Court of Appeals for the Eleventh Circuit compelling that court to reverse themselves on their decision barring the U.S. Government with Relator, Leon Braun , from bringing a qui tam action, under The False Claims Act, ("FCA"), 31 U.S.C. §§ 3729-30 et-seq, against the Defendants, Seminole Tribe of Florida and Seminole Tribe of Florida, Inc. as a result of the Indians asserting that the Federal Court lacks jurisdiction because of the Doctrine of Indian Sovereign immunity?

2. Does the U.S. Government abrogate the rights of the Seminole Tribe of Florida to invoke the purported doctrine of Sovereign Immunity when relating to violation of Federal Law pursuant to 25 CFR, Indians, Chapter 3, Subchapter II- § 81. Contracts and agreements with Indian tribes, which provides an express waiver of the right of the Indian tribe to assert sovereign immunity as a defense in a federal action brought against the Indian tribe?

3. Does the Seminole Tribe of Florida specifically abrogate its purported claim of Sovereign Immunity as related to violations of Federal law pursuant to its own Constitution of the Seminole Tribe of Florida, Ratified August 21, 1957 –*Article V, wherein The Seminoles Tribe agrees to abide by the United States Constitution and its Laws?*

4. *Can an Indian Tribe, (Seminole Tribe of Florida)* defraud the U.S. Government by taking money contrary to the provisions of the False Claims Act, 31 U.S.C. §§ 3729-30 et-seq, then assert absolute immunity from suit by invoking the purported doctrine of Tribal Immunity contrary to the provision of the U.S. Constitution. (Article 3 Clause 2) which states:

"the judicial Power shall extend to all Cases, in Law and Equity...-to Controversies to which the United States shall be a Party... "?

5. Was the lower courts' summary dismissal of the U.S. Government's complaint against the Seminole Tribe of Florida alleging violations of the False Claims Act, 31 U.S.C. §§ 3729-30 et seq, by invoking the Doctrine of Sovereign Immunity contrary to the provisions of the U.S. Constitution, Article 9 which states:

"No money . shall be drawn from the Treasury, but in Consequence of Appropriations made by Law; and a regular Statement and Account of the Receipts and Expenditures of all public Money shall be published from time to time. "?

6.Did the Eleventh District Court commit "Plain Error" when stating (see Page 3 of Appendix, under Analysis)

"While the various circuits of the United States Court of Appeals have not yet reached the issue of tribal sovereign immunity when a private citizen has brought a qui tam action against an American Indian tribe under the False Claims Act ... "

not withstanding the qui tam decision *(United States of America, ex rel. Glenn A. Hall, v. Tribal Development Corporation, No. 93-3519. Decided on Rehearing March 9, 1995.)* which have held that the Doctrine of Tribal immunity does not bar such action?

7..Did the Eleventh District Court and the Appellate Court commit Plain Error when not recognizing that the U.S. Government was the Plaintiff in this action and therefore, improperly by the Doctrine of Tribal Immunity, summarily dismiss this action; thereby substantially and severely impairing the right of the U.S. Government to collect damages as a result

of the improper and unlawful conduct of the Seminole Tribe of Florida in violation of the *False Claims Act ,31 U.S.C. §§ 3729-30 et-seq?*

8. Whether the Court's decision to grant immunity related to unaccounted fund, contrary to reporting required by *25 CFR 450c et-seq,* is in the Indian population's best interest as that decision allows needed funds to be dissipated without accountability?

****

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FEDERAL RULES OF CIVIL PROCEDURES. 1, 8

Rule 11. Signing of Pleadings, Motions, and Other Papers; Representations to Court; Sanctions

(b) Representations to Court.

By presenting to the courts pleading, written motion, or other paper, an attorney.. is certifying that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances,--

(1) it is not being presented for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation;

(2) the claims, defenses, and other legal contentions therein are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law;

(3) the allegations and other factual contentions have evidentiary support or, if specifically so identified, are likely to have evidentiary support after a reasonable opportunity for further investigation or discovery; and

(4) the denials of factual contentions are warranted on the evidence or, if specifically so identified, are reasonably based on a lack of information or belief.

(c) Sanctions.

If, after notice and a reasonable opportunity to respond, the court determines that subdivision (b) has been violated, the court may, subject to the conditions stated below, impose an appropriate sanction upon the attorneys, law firms, or parties that have violated subdivision (b) or are responsible for the

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G. Title 25 & 450c. Reporting and iii, 3
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financial assistance.

H. Plain Error Doctrine- ii, iii
Federal Rules of Criminal Procedure,
Rule 52 -

1.STATEMENT OF THE CASE

The Respondents' Brief in opposition to the U.S. A.'s Petition For a Writ of Mandamus takes the position that there is only one question involved.

"Whether the district court has subject matter jurisdiction to consider claim by an individual qui tam relator in the name of the United States against a federally recognized tribe under U.S.C. §476 and a federally chartered corporation under 25 U.S.C. § 477 for claims allegedly arising under the False Claims Act of 1986, 31 U.S.C. §§ 3729-30 et seq.

Defense then sates :

"counsel to the United States of America has set forth eight separate disjointed questions, each of which are embraced by the questions presented herein "[1]

The defense continues with their history of *(de nova)* rhetoric that has been shown to be irrelevant . [2]

We beg the court's indulgence because we feel obligated to again respond to show their irrelevance and why the eight questions posted by the Petition are relevant.

---

[1] We assume defense is referring to their one question above.

[2] The repeated "de nova" reviews of inapplicable cases and statements that were shown and known to be in error could be considered a violation of "Federal Rules of Civil Procures, Rule 11.

---

2. PROPER FORM.

Defense, on page 2 ,questions the use of the Mandamus as the proper form to be used rather than a petition for writ of certiorari. Defense states: *"Braun could have filed a petition for writ of certiorari in accordance with Rule 14 of the Rules of the Supreme Court..... "*

On page 10, defense states: *"the Appellate Court following a de nova review, was in no way ministerial but involved the court's exercise of proper judicial discretion,.."*
The "Petition For a Writ of Mandamus" repudiates these statements. It is contended the Appellate Courts' decision knowingly violated the Country's laws and Constitution. It follows, the Appellate Courts' decision should not have been discretionary and Mandamus is in order.
If a provider has new and material evidence or the prior determination is found to be inconsistent with law regulations or rulings, then there is a valid basis for reopening and the court has federal question and mandamus jurisdiction to review the refusal to reopen. (Memorial Hospital v. Sullivan, 779 F.Supp. 1410, 1412-13 (D.D.C.1991)).

Mandamus may be used for challenging the constitutionality or validity of statutes or official acts. (Wenke v. Hitchcock, 6 Cal.3d 746, 751, 100 Cal.Rptr. 290, 293 (1972)).

Questions 1, 2, 4, 5, 6, 7 of the petition address the issues of law impropriety and show why the Court has federal questions and mandamus is indicated.

3. DISCUSSION OF DEFENSES' BACKGROUND AND PROCEDURAL HISTORY.
Page 4, Note 3.
Defense notes that the Seminole Tribe of Florida, Inc. has its' own Board of Directors and its own budget. Defense references an unrefuted affidavit of Max E. Osceola.
This FCA case is filed against both the Seminole Tribe of Florida, and the Seminole Tribe of Florida, Inc.
The Seminole Tribe of Florida, Inc. is also required to file reports *(Title 25 & 450c, et seq).* Any, statement related to

funding is of no value without the documentation required to support it. There was no reason to refute the affidavit until the Court has been assigned jurisdiction. It also should be brought to the Court's attention that it is in the best interest of the Indian population that these reports be made. Question 8 of the Petition addresses that issue.

****

Page 10 of Respondent's Brief.

Defense states *"Indian tribes have long been recognized as possessing the common-law immunity from suit traditionally enjoyed by sovereign powers." "Santa Clara Pueblo v. Martinez".*

Plaintiff points out, in fact, there is no immunity to any sovereign powers when the United States is the Plaintiff. (See Petition Question 1(Page i) and Discussion 1(Page 4.))

The Santa Clara case requires us to decide whether a federal court may pass on the validity of an Indian tribe's ordinance denying membership to the children of certain female tribal members.

There is nothing in the Santa Clara case having to do with crimes against the government or violation of the constitution which are all part of the Governments' FCA case. Nor are any of the eight questions addressed.

The Santa Clara case is irrelevant.

****

Defense states , *"a suit against an Indian Tribe must be barred unless the tribe has clearly waived its immunity or Congress expressly abrogated that immunity by authorizing that suit".. See, Kiowa Tribe of Oklahoma v. Manufacturing Technologies, Inc., 523 U.S. 751(1998).*

In the Kiowa case, *"The Tribe's industrial development commission agreed to buy from respondent certain stock issued*

by a third party, the then-chairman of its business committee signed a promissory note, in the Tribe's name, agreeing to pay respondent $285,000 plus interest".

The Indians did not make the promised Payments. Suit was instituted. It went through the courts to the Supreme Court. There was dissenting opinions, but the Court ruled in favor for the Tribe.

The Kiowa case did not involve the U.S. Government as the Plaintiff. The Kiowa case did not involve violations of the Constitution. The Kiowa case does not address the questions put forth in the Mandamus. **The Kiowa case isn't relevant.**

****

Defendant cites, *Oklahoma Tax Commission v. Citizen Band Potawatomi Indian Tribe, 498 U.S. 505, 509. "The issue presented in this case is whether a State that has not asserted jurisdiction over Indian lands under Public Law 280 may validly tax sales of goods to tribesmen and nontribal members occurring on land held in trust for a federally recognized Indian tribe. We conclude that under the doctrine of tribal sovereign immunity, the State may not tax such sales to Indians, but remains free to collect taxes on sales to non tribal members."*

This Oklahoma case is interesting because the Court ruled there is immunity when the Indians are selling to their tribal members **but no immunity, and must pay tax when selling to non tribal members.**

In essence **The Supreme Court ruled there is no blanket immunity even if Congress and the Indian Tribes are mute on the subject.**

However, **the Oklahoma case is also not relevant to the False Claims Act case because the U.S. Government is not a party; there is no direct violation of the Constitution; it does not address the questions put forth in the Mandamus.**

****

Defendants then cite, *State of Florida v. Seminole Tribe of Florida, 181 F. 3d 1237, 1241, (11th Cir. 1999)*
According to the State's complaint, the Indians are operating illegal gambling in the State of Florida. The State cites IGRA and parts of applicable Title 25 and 18 U.S.C to make their point. The same 11th Circuit Board of Appeals ruled against Florida.
The Appellate Court and Defenses were made aware in the "Petition For Rehearing" that other Courts disagreed with the 11th Circuit.

U.S. 1st Circuit Court of Appeals No. 97-1644

Andrew Akins, et al v. Penobscot Nation, et al., "This case presents the first instance this court has been asked to address an important question in the allocation of sovereign powers between the Penobscot Nation and the State of Maine: the definition of "internal tribal matters." If the dispute here involves an "internal tribal matter" then the tribal courts have exclusive jurisdiction; if not, then claims have been stated within federal court jurisdiction and it was error to dismiss the action.."

And again in:

U.S. 8th Circuit Court of Appeals -U.S. v. Santee Sioux Tribe of Nebraska No. 97-1546 Submitted: November 19, 1997, Filed: January 29, 1998

***I.1** The Tribe argues that because of the Supreme Court's determination in Seminole Tribe that Congress was not empowered to authorize lawsuits by Indian tribes against states that fail to negotiate in good faith for a tribal-state compact, all provisions of the IGRA related to compacting are unconstitutional. We decline to address this argument given our conclusion that, under the IGRA, the State is not required to negotiate for gambling that is illegal under Nebraska law..*

***I.2** Because the video gambling engaged in by the Tribe is not permissible under Nebraska law, this activity is being conducted in violation of the IGRA, and the contention of the*

United States that it is entitled to an injunction from the District Court enjoining the further conduct of such activity by the Tribe is correct.

***I.3** The decision of the District Court is reversed and the case remanded for entry of an order enjoining the Tribe's operation of class III gaming devices and enforcing the Chairman's closure order.*

I.4** Because the IGRA is silent with respect to the authority to conduct litigation necessary to enforce the NIGC's closure orders in the event those orders are ignored or its assessments are left unpaid by Indian Tribes engaging in gaming activities in violation of the Act, **we must assume that Congress intended for the Attorney General to conduct this enforcement function on behalf of the agency.

And again in
U.S. v E.C. Investment,
U.S. 9th Circuit Court of Appeals , No. 94-50631 D.C. No CR-94-00361-RG-Argued and Submitted October 16, 1995- Pasadena, Cal, , Filed February 27, 1996

*Defendants' contention lacks merit because the plain language of sections 1166 and 1955 unambiguously establishes federal jurisdiction for the prosecution of large-scale gambling predicated on the use of slot machines prohibited by California law. **At the very least, a "person of ordinary intelligence" would have known that operating Class III games in Indian country without a Tribal-State compact violated IGRA.....** "*

However, the **Florida State v. The Seminole Tribe of Florida case is also not relevant to this False Claims Act case because the U.S. Government is not a party; there is no direct violation of the Constitution; it does not address the questions put forth in the Mandamus**.

****

Defense next cited[2] Florida Paraplegic Assoc., v.. Miccosukee

Tribe of Indians, 166 f. 3d 1126, 113001131 (11th Cir. 1999). The Court must decide whether Title III of the Americans With Disabilities Act, 42 U.S.C. º 12181 et seq. ("Title III of the ADA" or "Title III") creates a private right of action against Indian tribes who allegedly have failed to comply with its requirements.

The "Petition For Rehearing", pointed out the questionable areas in that decision by the 11th Circuit. The "Petition also stated **the case is not relevant to the False Claims Act case because the U.S. Government is not a party and there is no violation of the Constitution. Also,**

The questions put forth in the Mandamus are not addressed by the Florida v. The Seminole Tribe case .

****

On page 11 of the Respondents' Brief they refer to Indians as wards of the United States. This position is in conflict with the Defenses' immunity position. **It is incongruous to consider a ward to be immune to any regulation of its guardian**.

Oliphant v. Saquamish Indian Tribe, 35 U.S. 191 (1978) *stated that tribal sovereignty is limited in three ways: ---Justice Rehnquist -*

"Tribes are not permitted to exercise powers that are surrendered by treaty; and

Tribes are not permitted to exercise powers that are prohibited by federal statute; and

Tribes are not permitted to exercise powers that are inconsistent with their status of a domestic dependant nation."

****

On Page 12, Defense again cites State of Florida v. Seminole Tribe and Florida Paraplegic v. Miccossukee. The Defense keeps repeating non-applicable citations as if continued repetition will make them applicable. (ie. Kiowa, Oklahoma, Santa Clara, etc..)[2] They are not and can not be applicable because of the reasons stated and they do not address the eight

questions set forth in the Mandamus.

****

Despite being informed of specifics to the contrary [2], defense on page 15 states *"The language of the FCA, as set forth in 31 U.S.C. §3729 et seq., does not disclose on its face, **or anywhere in legislative history**, and clear and unmistakable Congressional intent.... "*

Defense was enlightened in the "Mandamus" that other Courts have ruled on this issue. [2] We repeat.

In *Reich v. Mashantucket* the Court of Appeals, McLaughlin, Circuit Judge, held that: *(1) inherent tribal sovereign power did not preempt application of federal regulatory scheme that was silent on its application to Indians;* "

"United States Court of Appeals, Seventh Circuit., United States of America v. Tribal Development Corporation, No. 93-3519. Decided on Rehearing March 9, 1995.

Qui tam action was brought on behalf of United States..., the Court of Appeals,...., held that: (1) United States, rather than parties that brought action on its behalf, was plaintiff for standing purposes, and (2) United States suffered sufficient injury-in-fact for purposes of Article III standing. "

"In determining whether to dismiss for lack of standing qui tam action against defendants, appropriate inquiry was whether United States suffered injury-in-fact, not whether its representatives suffered injury. U.S.C.A. Const. Art. 3, §2, cl. 1; 25 U.S.C.A. §§81, 201, 264. "

****

Defense continues to second guess Congressional intent with statements like:[2]

"Specific Indian rights will not be deemed to have been abrogated or limited absent a "clear and plain Congressional intent... "

Braun, in past briefs, and most recently in the Mandamus, has

shown where our Constitution and written law make it plain that there can be no Indian Sovereignty when the United States is the Principal in a Court action. We repeat: *U.S. ex rel. McCarty v. Hollis, C.C.A.10 (Okla.) 1941, 120 F.2d 540). The jurisdiction of a United States court to entertain a suit by the United States for enforcement... is based on the provision that judicial power of United States shall extend to all controversies to which the United States is a party.*

And: United States v. Red Lake Band of Chippewa Indians, 827 F.2d 380, 382 (8th Cir. 1987) ("[It is an inherent implication of the superior power exercised by the United States over the Indian tribes that a tribe may not interpose its sovereign immunity against the United States."

****

4. Conclusion:

1.The issues and arguments presented by Defense have been addressed and shown to be irrelevant or in error.

2.Defense has not demonstrated, in any way, why the questions with answers presented in Mandamus are not relevant, or where they are in error, or why they shouldn't be governing in this case.

3.Congress did abrogate any Indian immunity in a Federal action brought against an Indian Tribe.(Title 25, Chapter 3, Subchapter II, §81)

4. The Constitution, Article 3, Clause 2, clearly states *"the judicial Power shall extend to all Cases, in Law and Equity...-to Controversies to which the United States shall be a Party..."*

It is respectfully requested this Petition for a Writ of Mandamus be granted so this case can proceed to satisfy facts, honesty, and justice under the law.
Submitted this day of March 20, 2001

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